STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 19,063
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families, Economic Services, (DCF) denying her Medicaid coverage for certain dental work. The issue is whether the services in question are considered "dental services" or "medical and surgical services of a dentist" under the pertinent regulations.

FINDINGS OF FACT

1. At all times herein the petitioner has been a recipient of Medicaid.

2. In March 2004 the petitioner's dentist submitted a request for Medicaid coverage in the petitioner's behalf for resin and amalgam fillings for twelve of the petitioner's teeth. The Department denied this request because the work exceeded the annual cap on dental services of $475.

3. The petitioner filed an appeal of this decision in May 2004. In August 2004 she notified the hearing officer

that she had paid for the dental work herself, and that she was now seeking reimbursement from Medicaid.[1]

4. The petitioner has submitted statements from her treating physician (not disputed by the Department) that the dental treatment at issue constituted "restorations" of decay in her existing teeth that was "debilitating" in terms of her not being able to chew her food. The physician opined that if not treated this could have led to a deterioration of the petitioner's "current oral and dental infection" and "symptoms of food regurgitation and heartburn".

5. It appears that the work done by the petitioner's dentist was billed at an amount five or six times the $475 annual limit.

6. The petitioner's physician also stated that under Vermont law, a physician with the requisite "skills and equipment" could legally have performed the services in question. However, although it appears that the work required by the petitioner was extensive, there is no indication in the record that the services in question were

[1] Consideration of this matter was delayed several months for the Department to consider whether it would review the petitioner's coverage under § M108. On October 14, 2004 the Department notified the petitioner and the Board that it had determined that the claim did not meet the criteria for M108 review. The petitioner has not indicated that she takes issue with this decision (if she does, she is free to file a separate appeal on this issue).

for anything other than routine fillings of decayed teeth, work which is usually and customarily performed by a dentist.

ORDER

The Department's decision is affirmed.

REASONS

"Dental services" for persons 21 and over are defined in state and federal regulations as "preventive, diagnostic, or corrective procedures involving the oral cavity and teeth". Such services are "optional" for states to provide under federal law (see 42 C.F.R. § 440.225). Included in Vermont's list of services covered under this category is "restoration of decayed teeth". W.A.M. § M621.3. However, the Vermont regulations specifically restrict Medicaid coverage for *all* dental services to a maximum of $475 a year per patient. § M621.4.

The above notwithstanding, Federal regulations require states to provide full Medicaid coverage for "medical and surgical services of a dentist". 42 C.F.R. §§ 440.210 and 440.50(b). Such services are defined by the Department's regulations as "services furnished by a doctor of dental medicine or dental surgery if the services are services that: 1) if furnished by a physician, would be considered physician

services; and 2) under Vermont law, may be furnished either by a physician or a doctor of dental medicine or surgery." W.A.M. § M619.1.[2]

In this case, the petitioner has established only that under Vermont law a physician *could have* performed the dental work in question. However, she has made no showing that the type of "restoration services" her dentist provided was either customarily or legally considered a "physician service" as opposed to a "dental service". The petitioner's physician did not indicate that *she* had the requisite "skills and equipment" to perform the service in question; and, indeed, there has been no claim or showing that *any* physician in this state, in fact, has such skills and/or equipment—or inclination.

The parties agree that the legislative history of the federal provisions (H.R. Rep. 100-391[I], P.L. 100-203, O.B.R.A. 1987, Oct. 26, 1987, at 523-524), upon which the Vermont regulation is based, include the following sections:

> Under current law, States are required to offer physicians' services to their categorically needy Medicaid eligibles. States may limit the amount,

[2] The regulations (§ M619.3) list the following services exclusively covered under this section: "biopsies; repair of lacerations; excision of a cyst or tumor; reconstructive surgery; reduction of a fracture; and repair of temporomandibular joint dysfunction, including surgical treatment."

> duration, or scope of these services, and States have considerable discretion in establishing reimbursement rates and methods. Physicians' services are defined as services furnished by a doctor (of) medicine or osteopathy legally authorized to practice medicine and surgery by the State in which he performs such function or action (including osteopathic practitioners within the scope of their authorized practice under State law).
>
> The committee is informed that some States cover, as a physicians' service, certain services or procedures, such as corrective surgery for bimaxillary protrusion, that are commonly performed by dentists or dental surgeons within the scope of their practice under State law. States, may not, however, receive Federal Medicaid matching funds for reimbursing dentists for these services or procedures that State law allows them to perform, since the current Medicaid definition of physician excludes dentists and dental surgeons. The Committee can find no justification for this exclusion.
>
> Accordingly, the Committee amendment would expand the definition of physicians' services to include medical and surgical services furnished by a doctor of dental surgery or dental medicine who is licensed to practice dentistry by the State in which he practices, but only to the extent that such medical or surgical services may be performed under State law both by a physician and by a dentist, and only to the extent that such services would, if furnished by a physician, constitute a physicians' service under the State's Medicaid plan. The Committee amendment would not mandate provision of dental services; that coverage would remain an option for the States. The amendment is effective for covered services provided on or after January 1, 1988, whether or not final regulations to carry out the amendment have been promulgated by such date.

From the above history it is clear that Congress's concern was limited to "*certain* services or procedures, *such as corrective surgery for bimaxillary protrusion, that are*

commonly performed by dentists or dental surgeons" (emphasis added). There is no indication in the above legislative history that Congress, as a general matter, was sweeping all customary *dental* services, such as fillings, into mandatory Medicaid coverage. The intent of Congress in enacting 42 U.S.C. § 1396d(a)(5) (which is the basis for the federal regulation at 42 C.F.R. § 440.50[b]; which is, in turn, the basis of Vermont regulation M619.1 [see *supra*]) was clearly and simply limited to reimbursing states for any Medicaid-defined *physician* service[3], such as "surgery", that *may be* performed by a dentist or oral surgeon.

Indeed, there appears to be no dispute in this matter that, strictly as a matter of *licensure*, physicians in Vermont (and, presumably, in most other states) are *legally* qualified to perform virtually *any* dental service. The medical evidence in this case establishes that the petitioner has extensive decay in her teeth. However, the severity of her condition, alone, does not transform the type of *service* she is seeking, i.e., amalgam fillings, from a "dental" to "physician" service.[4] Nothing in the plain language of the pertinent federal and state statutes and regulations, nor in

[3] See W.A.M. §§ M600 *et seq.*

the federal legislative history of those provisions (*supra*), supports the argument that Vermont's annual monetary cap on "dental services" can be circumvented simply by showing that such a service *could*, under state law, also be performed by a physician.

Therefore, it must be concluded that the Department's decision in this matter is in accord with the above federal and state provisions defining dental and physician services. Accordingly, the Department's decision defining the petitioner's dental work as "dental service", and limiting Medicaid coverage to $475 per year, must be affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

# # #

[4] Depending on the severity of any dental condition, an individual may be eligible for General Assistance under W.A.M. § 2602.3.